

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

CHRISTOPHER WATKINS,

Plaintiff,

v.

RAPID FINANCIAL SOLUTIONS, INC., *et al.*,

Defendants.

Case No. 3:20-cv-00509-MMD-CSD

ORDER

The instant case is a class action to recover damages for prepaid debit card fees charged to persons released from prison in Nevada.¹ Before the Court are the parties' cross-motions for summary judgment (ECF Nos. 93 ("Plaintiff's Motion"), 95 ("Defendants' Motion"), 96 ("Keefe's Motion") (collectively, "Motions")) and Plaintiff's motion to strike Keefe's Motion (ECF No. 99).² As explained below, the Court will deny the motion to strike, deny Keefe's Motion, and grant in part and deny in part Plaintiff's and Defendants' Motions.

I. BACKGROUND

The following is undisputed unless otherwise noted.

Every incarcerated individual in Nevada has an inmate trust account. (ECF No. 98 at 4.) The balance of this account must be returned to the individual upon their release from custody. (*Id.*)

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¹Named plaintiff Christopher Watkins has filed suit against Defendants Rapid Financial Solutions, Inc. d/b/a Access Freedom Cards; Axiom Bank N.A.; and Keefe Commissary Network, LLC.

²The Court has also reviewed the parties' responses and replies. (ECF Nos. 94, 97-98, 100-04.)

1 **A. Rapid, Keefe, and Axiom**

2 Keefe is a commissary company that offers a variety of services to correctional
3 institutions, including prepaid debit cards for released inmates. (ECF No. 93 at 9.) Keefe
4 obtains these release card program contracts when correctional facilities submit
5 requests for proposals for release card programs and Keefe respond to these requests
6 with a proposal. (ECF No. 98 at 9-10.) If Keefe's proposal is accepted, then Keefe
7 contracts with the correctional facility, and Rapid serves as a subcontractor to that
8 commissary contract. (*Id.* at 10.; ECF No. 94 at 5.)

9 Rapid provides prepaid card programs which allow correctional facilities to
10 disburse inmates' trust fund balances upon their release. (ECF Nos. 94 at 4; 98 at 4-5.)
11 These cards are only available to released inmates. (ECF No. 98 at 5.) Rapid is not a
12 bank and cannot lend money or issue prepaid cards. (*Id.* at 6.) Axiom, a bank, has
13 electronically held and loaded the funds on release cards since September 2018. (*Id.*;
14 ECF Nos. 93 at 8; 94 at 5.) Axiom does not interact with cardholders. (ECF No. 93 at 8.)
15 Rapid, the release card program manager, works with Axiom to resolve any banking
16 challenges or violations. (*Id.*)

17 **B. Nevada Release Card Program**

18 One of Rapid's release card programs is the Access Freedom Card ("Release
19 Card"). (ECF No. 98 at 5.) The Release Cards are offered to correctional institutions as
20 a means to distinguish the bank account that is held in trust for an individual inmate,
21 and they are specific to Keefe and Nevada. (ECF Nos. 93 at 9; 98 at 5.) The Release
22 Cards are thus only available to persons released from a Nevada correctional facility.
23 (ECF No. 98 at 11.) Funds loaded onto Release Cards may come from an inmate's
24 wages earned while incarcerated, money deposited on their behalf from friends and
25 family, cash taken from the inmate at the time of their incarceration, or retirement
26 payments. (ECF Nos. 93 at 10; 94 at 6.) Keefe first entered into a commissary services
27 contract with the state of Nevada in 2011. (ECF No. 98 at 11.) Rapid began providing
28

1 the Release Card program to the Nevada Department of Corrections (“NDOC”)³ in
2 October 2014. (*Id.*)

3 To obtain this Release Card contract, Keefe marketed the Release Cards to
4 NDOC on Rapid’s behalf via NDOC’s competitive bidding process. (ECF No. 93 at 10.)
5 The contractual relationship for the Release Cards thus exists between NDOC and
6 Keefe, not Rapid. (*Id.*) Rapid and Keefe are subject to their own contract, making Rapid
7 a subcontractor to Keefe’s contract with NDOC. (*Id.* at 11; ECF Nos. 94 at 7-8; 98 at
8 10.) NDOC is not contractually obligated to provide Release Cards to released inmates,
9 but it determines how inmate trust funds are returned to inmates. (ECF No. 98 at 11-
10 12.) It is unclear whether released inmates are initially offered the option to receive cash
11 or a check, but once a released inmate receives their Release Card, they may take out
12 the balance on a check. (*Id.* at 5-6; ECF Nos. 93 at 13; 94 at 8; 102 at 5.)

13 Rapid physically attaches the terms and conditions of the Release Card
14 (“Cardholder Agreement” or “Agreement”) to blank, unloaded Release Cards.⁴ (ECF No.
15 93 at 12.) The Agreement is folded around Release Cards such that only the bar code
16 of the Card is visible. (*Id.*) These unloaded Cards are then bulk shipped to NDOC. (*Id.*
17 at 12.) Upon an inmate’s release, NDOC employees load the inmate’s trust fund
18 balance onto their Release Card using Keefe’s banking software and Rapid’s computer
19 system. (ECF No. 94 at 7-8.) The funds are transferred to Axiom the next day. (*Id.* at 8;
20 ECF No. 93 at 12.)

21 Release Cards are subject to the following fees, which NDOC negotiated. (ECF
22 No. 98 at 11.) Three days after a Release Card is validated, it begins incurring a \$1.50
23 weekly account maintenance fee until no funds remain. (ECF Nos. 93 at 12-13; 94 at 9;
24 95 at 8.) Cardholders must pay a \$2.75 fee for every ATM withdrawal, a \$1.50 fee for
25

26 ³Defendants dispute the allegation that they contract with several Nevada
27 counties but do concede that they have a contractual relationship with NDOC. (ECF
28 Nos. 93 at 9-10; 94 at 5-6.) Because Plaintiff was in NDOC custody, the Court’s
analysis will focus on Defendants’ relationship with NDOC.

⁴This has been Rapid’s practice since April 2017. (ECF No. 98 at 6.)

1 every ATM balance inquiry, and a \$2.99 fee for card replacement. (ECF Nos. 93 at 12-
2 13; 94 at 9.) A cardholder can avoid fees by requesting a check for the account balance,
3 making purchases where MasterCard is accepted, requesting cash back from a
4 merchant who accepts MasterCard, sending funds to their bank account via ACH
5 transfer, transferring the funds to a PayPal or Amazon account, or removing the entire
6 balance at a MasterCard principal financial institution. (ECF Nos. 93 at 13; 94 at 9; 98 at
7 8.)

8 Release Cards must be validated before they can be used, and simply loading a
9 Release Card will not validate it. (ECF No. 98 at 7.) Periodic maintenance fees will not
10 be charged until a Release Card is validated. (*Id.* at 8.⁵)

11 **C. Plaintiff's Receipt of a Release Card**

12 Plaintiff Christopher Watkins was incarcerated in an NDOC facility until his
13 release on parole on April 13, 2020. (ECF No. 93 at 8.) While Plaintiff was incarcerated,
14 his family had deposited money for him to use at the commissary, and he also earned
15 money working as a firefighter. (ECF No. 98 at 12.) He had \$431.20 in his inmate trust
16 fund accounts when he was released. (*Id.*; ECF No. 93 at 15.) Plaintiff believed that
17 these funds would be paid out in cash or via a check without any discount, though he
18 did not identify the source of this belief. (*Id.* at 13; ECF No. 94 at 9-10.) Plaintiff did not
19 have any communications with Keefe or Axiom, nor did he communicate with Rapid
20 until after his release. (ECF No. 94 at 10.)

21 Plaintiff met with a NDOC caseworker on April 3, 2020, to begin the release
22 process. (ECF No. 93 at 13.) The caseworker told him that his funds would be loaded
23 onto a debit card. (*Id.*) NDOC did not offer Plaintiff alternative options for receiving his
24 inmate trust funds, although he could have cashed out his Release Card with a check.
25 (ECF Nos. 93 at 14; 94 at 10; 98 at 13.) Moreover, it is unclear whether NDOC could
26 have originally issued a check for Plaintiff's funds instead, given that one of his signed

27 ⁵Plaintiff disputes this allegation in part because he "did not confirm the fee" and
28 "simply agreed that it is the 'pamphlet' that he was not allowed to review until he was
actually released." (ECF No. 98 at 8.)

1 release forms includes a space to denote a check number and amount. (ECF Nos. 93-5
2 at 14; 93-11 at 2.) The caseworker further told Plaintiff that his Card would be activated
3 before his release.⁶ (ECF Nos. 93 at 14; 94 at 11.) Plaintiff was shown a debit card
4 attached to a pamphlet and told to sign his release papers.⁷ (ECF No. 93 at 14.) Plaintiff
5 was not allowed to review the pamphlet until his release a week later. (*Id.*) He believed
6 that he had to accept the Release Card to be released from NDOC custody. (*Id.*; ECF
7 No. 94 at 11.)

8 The caseworker told Plaintiff that he would be charged fees for using the Release
9 Card and advised Plaintiff to withdraw his money as soon as possible, but Plaintiff was
10 unaware of the exact fee schedule for the Release Card. (ECF Nos. 93 at 14; 94 at 11.)
11 The caseworker did not explain other ways to avoid fees. (ECF Nos. 93 at 15; 94 at 11.)
12 Plaintiff would have preferred to receive cash or a debit card that did not charge
13 “exorbitant” fees. (ECF Nos. 93 at 14; 94 at 11.) He did not want his funds distributed
14 via a check because he had no way to cash a check without a bank account and it
15 would have been “basically impossible” for him to use a check for his post-release
16 travel. (ECF No. 98 at 14.)

17 Three days later, Plaintiff’s \$431.20 inmate trust fund balance was loaded onto
18 his Release Card. (ECF No. 93 at 15.) And on April 10, 2020, Plaintiff’s Release Card
19 was charged its first account maintenance fee. (*Id.*; ECF No. 94 at 12.) Account
20 maintenance fees are not supposed to be levied until three days after a Release Card is
21 validated. (ECF No. 98 at 8.) It is therefore unclear exactly how and when the Card was
22 validated, as Plaintiff claims that he could not and did not activate his Release Card on
23 April 7, 2020. (ECF Nos. 93 at 15; 94 at 12.)

24
25 ⁶Defendants contest whether the activation actually occurred. (ECF No. 94 at
26 11.)

27 ⁷Defendants allege that the record does not include Plaintiff’s signed Cardholder
28 Agreement. (ECF No. 94 at 11.) Plaintiff included as an exhibit some largely illegible
release paperwork that appears to be signed by him. (ECF No. 93-11 at 2-3, 16.) The
pamphlet which appears to be the Cardholder Agreement does not have a signature
line. (*Id.* at 4-13.)

1 Plaintiff first took possession of the Release Card and Cardholder Agreement on
 2 the date of his release, April 13, 2020. (ECF Nos. 93 at 15; 94 at 12.) Plaintiff's primary
 3 concern at that time was traveling home to Pennsylvania in a timely manner so as to not
 4 violate his parole. (*Id.* at 16; 94 at 13.) Plaintiff arrived at a convenience store on this
 5 day and was unable to complete a purchase using his Release Card until he called the
 6 customer service number on the Card. (ECF No. 98 at 13.)

7 Plaintiff was charged a weekly 'account maintenance fee' of \$1.50 between April
 8 10 and July 24, 2020, until his account balance reached zero. (ECF No. 93-12 at 2.) An
 9 additional \$17.48 in unpaid wages was deposited onto Plaintiff's Release Card in early
 10 May 2020. (ECF No. 93 at 16.) Plaintiff was not informed of this deposit, and thus the
 11 entirety of the \$17.48 was lost to account maintenance fees. (*Id.*) A total of \$24.02 in
 12 fees was charged to Plaintiff's Release Card. (*Id.*)

13 **D. Procedural History**

14 In October 2017, the plaintiffs in *Reichert v. Keefe Commissary Network, L.L.C.*,
 15 No. 3:17-CV-05848-BHS, filed suit in the Western District of Washington to challenge
 16 the distribution of prepaid debit cards with high fees to released inmates. See ECF No.
 17 1 (W.D. Wash. Oct. 20, 2017). The *Reichert* plaintiffs named Keefe, Rapid Financial,
 18 and Cache Valley Bank as defendants. See *Reichert v. Keefe Commissary Network*,
 19 *L.L.C.*, No. 3:17-CV-05848-BHS, ECF No. 129 (W.D. Wash. Dec. 23, 2020). The
 20 Western District of Washington certified a nationwide class ("Nationwide Class") and a
 21 Washington state subclass ("Washington Subclass"). See *Reichert v. Keefe*
 22 *Commissary Network, L.L.C.*, 331 F.R.D. 541, 558 (W.D. Wash. 2019); *Reichert v.*
 23 *Keefe Commissary Network, L.L.C.*, No. 3:17-CV-05848-BHS, ECF No. 93 (W.D. Wash.
 24 May 28, 2019). The Washington Subclass settled with Keefe, and Keefe was dismissed
 25 from the action in January 2023. See *Reichert v. Keefe Commissary Network, L.L.C.*,
 26 No. 3:17-CV-05848-BHS, 2023 U.S. Dist. LEXIS 12237, *2 (W.D. Wash. Jan. 24, 2023).
 27 The Nationwide Class reached a settlement with the remaining defendants ("*Reichert*
 28 Settlement"), and the Western District of Washington approved the *Reichert* Settlement

1 on December 19, 2023. See *Reichert v. Keefe Commissary Network, L.L.C.*, No. 3:17-
2 CV-05848, 2023 WL 8775720 (W.D. Wash. Dec. 19, 2023).

3 In July 2020, Plaintiff Watkins similarly filed a complaint on behalf of a class of
4 persons incarcerated in Nevada seeking compensation for release card fees. (ECF No.
5 1-2.) The Court granted Plaintiffs' motion to certify a class of people recently
6 incarcerated in Nevada who were required upon release to use prepaid debit cards
7 which carried high fees, without any other alternative means of reimbursement. (ECF
8 No. 65 at 16.) This case was then stayed pending the approval of the *Reichert*
9 Settlement. (ECF Nos. 87, 89.) Now that the *Reichert* Settlement has been approved
10 and the stay has been lifted, the parties have moved for summary judgment. (ECF Nos.
11 93, 95, 96, 99.)

12 II. MOTION TO STRIKE

13 Plaintiff moves to strike Keefe's Motion and its corresponding exhibits (ECF Nos.
14 96, 96-1–96-3) because, taken with Defendants' Motion, it violates this district's 30-page
15 limit on motions for summary judgment and Keefe did not request, nor did the Court
16 grant, leave to file this second Motion.⁸ (ECF No. 99.) See LR 7-2(g), 7-3(a). Typically,
17 "separately filed motions are considered together for purposes of page limits when they
18 brief the same claims." *United States v. Sayers Constr., LLC*, No. 2:19-CV-1602-JCM-
19 EJY, 2022 WL 772935, at *2 (D. Nev. Mar. 14, 2022), *vacated in part on other grounds*
20 *on reconsideration sub nom.* 2022 WL 2275180 (D. Nev. June 22, 2022). But Keefe's
21 Motion addresses a separate issue which, although pertaining to the same claims
22 addressed in Defendants' Motion, is specific to Keefe: Keefe's individual liability as a
23 purportedly unregulated entity. See *Santos v. Baca*, No. 2:11-CV-01251-KJD-NJK, 2017
24 WL 773874, at *2 (D. Nev. Feb. 28, 2017). Keefe has not circumvented the local rules
25 by filing this separate Motion, and Plaintiff's motion to strike is denied.

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27
28 ⁸Plaintiff withdrew his motion to strike two declarations filed in support of
Defendants' Motion. (ECF No. 104 at 4 n.1.)

1 **III. MOTIONS FOR SUMMARY JUDGMENT**

2 The parties have filed cross-motions for summary judgment as to each of
3 Plaintiff's claims. The Court will address each theory of liability and corresponding
4 defense in turn.

5 **A. *Reichert* Class Members**

6 The parties agree that summary judgment is warranted for all persons covered
7 by the *Reichert* Settlement. (ECF Nos. 95 at 15; 98 at 17.) Defendants' Motion is
8 granted against any class members who were members of the *Reichert* Settlement.
9 This does not include any class members who have claims arising between July 31 and
10 October 20, 2016, or after January 18, 2024, or who opted out of the *Reichert*
11 Settlement (collectively, "Remaining Class Members").

12 **B. Electronic Funds Transfer Act**

13 Congress enacted the Electronic Fund Transfer Act of 1978 ("EFTA") to "address
14 concerns raised by the increasing prevalence of electronic banking transactions," as
15 they "viewed such transactions—processed through computer networks without human
16 interaction—as much more vulnerable to fraud, embezzlement, and unauthorized use
17 than the traditional payment methods." *Widjaja v. JPMorgan Chase Bank, N.A.*, 21 F.4th
18 579, 580-81 (9th Cir. 2021) (quotation marks omitted). Under the EFTA, consumers
19 may challenge the issuance of an unsolicited prepaid card and the imposition of service
20 fees on a prepaid card within one year of the relevant alleged EFTA violation. See 15
21 U.S.C. §§ 1693i, 1693l-1, 1693m(g). Plaintiff alleges that Defendants violated the
22 EFTA's restrictions on issuing unsolicited prepaid cards and charging service fees. The
23 Court agrees as to the service fees but denies summary judgment on the prepaid card
24 issuance claim.

25 **1. Keefe's Liability**

26 As a threshold matter, Keefe argues that it is not a 'financial institution' subject to
27 the requirements of EFTA Subchapter 1693. See 12 C.F.R. § 1005.3(a). This argument
28 is inapplicable to Plaintiff's claims under EFTA Section 1693l-1 because the restrictions

1 on imposing improper service fees on general use prepaid cards are not limited to
2 financial institutions but instead apply to “any person.” *Id.*; *see also* 12 C.F.R. §
3 1005.20(d) (mandating that, unless certain conditions are met, “[n]o person may impose
4 a . . . service fee with respect to a . . . general-use prepaid card”).

5 Nor is Keefe excluded from liability under the other provisions of Subchapter
6 1693. The EFTA defines a ‘financial institution’ as “a bank, savings association, credit
7 union, or any other person that directly *or indirectly* holds an account belonging to a
8 consumer.” 12 C.F.R. § 1005.2(i) (emphasis added); *accord* 15 U.S.C. § 1693a(9).
9 Keefe signed a contract with NDOC to provide release card services and then
10 subcontracted the release card program to Rapid, who, in turn, has Axiom hold the
11 Release Card funds. Given that the “primary objective” of EFTA Subchapter 1693 is “the
12 protection of individual consumers,” the Court will liberally interpret ‘indirectly holding a
13 consumer account’ to include situations, like the one at present, where a company has
14 subcontracted out the holding of consumer accounts. 12 C.F.R. § 1005.1(b); *accord* 15
15 U.S.C. § 1693(b). Finding otherwise could harm consumers by allowing companies to
16 avoid liability under the EFTA if they subcontract the actual holding of funds to another
17 entity, regardless of whether they have benefitted financially from their subcontractors’
18 EFTA violations or possibly even committed EFTA violations themselves.

19 Keefe’s Motion is therefore denied.

20 **2. Issuance of the Cards**

21 Section 1693i of the EFTA prohibits issuing unsolicited debit cards absent the
22 following requirements. The card (1) may not be pre-validated, (2) must be
23 accompanied by “a complete disclosure” of the recipient’s rights and liabilities if they
24 validate the card and (3) a clear explanation that the card is not validated and how it can
25 be disposed of if validation is not desired, and (4) may be “validated only in response to
26 a request or application from the consumer, upon verification of the consumer’s
27 identity.” 15 U.S.C. § 1693i(b). The record does not clearly establish whether Plaintiff’s
28 Release Cards met all these requirements, and thus both Motions are denied as to

1 Plaintiff's claim under Section 1693i.

2 **a. Validation of Card**

3 Plaintiff alleges that his Release Card was validated by someone else before he
 4 received it on April 13, 2020. A card is validated when “the institution has . . . performed
 5 all the procedures that would enable a consumer to initiate an electronic fund transfer
 6 using the access device.” 12 C.F.R. § 1005.5(b)(1) (defining ‘not yet validated’); *accord*
 7 15 U.S.C. § 1693i(c) (“[A] card . . . is validated when it may be used to initiate an
 8 electronic fund transfer.”). Plaintiff recounts arriving at a convenience store on the day
 9 he was released from NDOC custody and received his Release Card—April 13, 2020—
 10 and being unable to use his Card at the store. (ECF No. 95-5 at 29.) Plaintiff then had to
 11 place a call regarding the Release Card so that he could access his money and
 12 complete a purchase. (*Id.*; ECF No. 93-5 at 23-24, 37.) Thus, by Plaintiff’s own account,
 13 he was unable to use the Release Card to initiate an electronic fund transfer until after
 14 he received it and orally requested validation. See 12 C.F.R. § 1005.5(b)(1), (4). Based
 15 on these facts alone, it would appear that his Card was not validated until he called
 16 Rapid on April 13, 2020.

17 But even though Defendants informed the Court that “a periodic maintenance fee
 18 will not be charged until the release card is validated,” financial records show that
 19 Plaintiff paid an account maintenance fee on April 10, 2020—three days before
 20 Defendants claim he validated his Release Card. (ECF Nos. 93-12 at 2; 95 at 8.)
 21 Viewing Defendants’ representations about maintenance fees in the light most favorable
 22 to Plaintiff, a triable issue of fact remains as to when, and by whom, his Release Card
 23 was validated. See 15 U.S.C. §§ 1693i(b)(1), (4); *Scott v. Harris*, 550 U.S. 372, 378
 24 (2007).

25 **b. Complete Disclosure of Rights and Liabilities**

26 Financial institutions generally must make certain disclosures “before a
 27 consumer acquires a prepaid account.” 12 C.F.R. § 1005.18(b)(1)(i). But when a
 28 financial institution or third party uses a prepaid account to disburse funds to a

1 consumer without offering alternative means for receiving those funds, that information
2 may instead be disclosed when the consumer receives their prepaid account. *See id.* In
3 these instances, the entity disbursing the funds may provide the required disclosures
4 “together with the prepaid account (e.g., in the same envelope as the prepaid account).”
5 12 C.F.R. § 1005.18(b)(1) (Supp. I.)

6 Defendants do not dispute that NDOC only offered to distribute Plaintiff’s inmate
7 trust fund balance on a Release Card, nor does Plaintiff challenge the thoroughness of
8 the disclosures in the Cardholder Agreement or that he received the Agreement with his
9 Release Card. However, viewing the record in the light most favorable to Plaintiff, a
10 factual question remains as to whether NDOC also disburses inmate trust funds via
11 check but failed to offer this option to Plaintiff. (ECF Nos. 93-5 at 14; 93-11 at 2.) *See*
12 *Scott*, 550 U.S. at 378. Summary judgement is therefore denied as to whether
13 Defendants issued Plaintiff’s Release Card in compliance with Section 1693(b)(2).

14 **c. Clear Explanation of Disposal**

15 Release Cards must also be “accompanied by a clear explanation that the
16 release card is not validated and how the consumer may dispose of the release card if
17 validation is not desired.” 15 U.S.C. § 1693i(b)(3). The Release Cards are affixed with a
18 sticker stating, “This card is **inactive** and must be **validated**,” and the Cardholder
19 Agreement, which contains an explanation of how to dispose of an unwanted Release
20 Card. (ECF Nos. 95 at 7-8; 98 at 7-8.) Though the record clearly establishes that
21 Plaintiff’s Release Card was accompanied by these required explanations, their clarity is
22 uncertain. (ECF No. 93 at 15 (stating that Plaintiff could not understand most of the
23 Agreement).) Whether these disclosures were sufficiently clear to released inmates for
24 the purposes of Section 1693i(b)(3) is a factual question that cannot be resolved at this
25 juncture.

26 The Motions are denied as to whether the issuance of Plaintiff’s Release Card
27 fully complied with EFTA Section 1693i.

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3. Charging Service Fees

Plaintiff next challenges the weekly ‘account maintenance fee’ charged to Release Cards. Defendants argue that the fee limitations of EFTA Section 1693I-1 do not apply to Release Cards because Section 1693I-1 only covers ‘general-use prepaid cards’⁹ that are “marketed to the general public,” 15 U.S.C. § 1693I-1(a)(2)(D)(iv); *accord* 12 C.F.R. § 1005.20(b)(4), and issued “in exchange for payment,” 12 C.F.R. § 1005.20(a)(3)(i). Contrary to Defendants’ assertions, the Release Cards are regulated general-use prepaid cards, and the weekly account maintenance fees violated the EFTA’s service fee restrictions.

a. Marketed to the General Public

Release Cards are distributed to people being released from correctional institutions in Nevada—a group which may constitute the ‘general public’ for the purposes of the EFTA. See *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 573 (9th Cir. 2020) (“*Brown II*”) (citing 12 C.F.R. § 1005.20(b)(4) (Supp. I), <https://perma.cc/6K6T-N4DM>).¹⁰ In assessing whether the Cards are ‘marketed’ to released inmates, the Court should consider “the means or channel through which the card may be obtained by a consumer, the subset of consumers that are eligible to obtain the card[,] and whether the availability of the card is advertised or otherwise promoted in the marketplace.” *Id.* (quoting 12 C.F.R. § 1005.20(b)(4) (Supp. I)) (ellipses omitted). Applying these factors, the Court concludes that the Release Cards are marketed to people released from NDOC custody.

⁹These protections also extend to gift certificates and gift cards, but there is no dispute that neither of these categories includes Release Cards.

¹⁰Defendants argue that the Court should not adopt the Ninth Circuit’s analysis in *Brown II* because the appellate court assessed only whether the plaintiff had adequately pled a claim under Section 1693I-1 for the purposes of a motion to dismiss. (ECF No. 95 at 23.) See 953 F.3d at 573. However, the parties in *Brown II* posed the same questions, and the Ninth Circuit conclusively held that “Defendants marketed their cards to the general public” and that Section 1693I-1 applied to the fees they had imposed. 953 F.3d at 573 (“Specifically, [defendants] contend that (1) inmates are not the general public, and (2) Defendants did not directly market the cards to inmates.”). The Court will therefore adhere to this binding Ninth Circuit decision. See *Yong v. I.N.S.*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000).

1 Rapid obtains release card contracts when correctional facilities submit requests
 2 for release card program proposals and a commissary company, like Keefe, responds
 3 with a bid. (ECF No. 95 at 9.) This bidding process constitutes the marketplace in which
 4 release card programs are sold to NDOC. *See Marketplace*, BLACK'S LAW DICTIONARY
 5 (10th ed. 2019). By promoting and selling Rapid's Release Cards through the NDOC
 6 bidding process, Keefe marketed those cards to NDOC.¹¹ (ECF No. 93 at 10.) *See also*
 7 *Brown II*, 953 F.3d at 573.

8 NDOC then offers the Cards to people being released from Nevada correctional
 9 facilities. Whether these Release Cards are the only option for receiving their funds is
 10 immaterial to the ultimate conclusion that these Cards are marketed to released
 11 inmates, as Section 1693I-1 applies regardless of whether a card is directly or indirectly
 12 promoted to consumers. *See* 12 C.F.R. § 1005.20(b)(4) (Supp. I). If the Release Cards
 13 are the only option for receiving inmate trust funds—as they were for Plaintiff—then the
 14 Cards are indirectly marketed to released inmates. Keefe markets the Release Cards to
 15 NDOC, and Defendants “know, expect, and intend” that NDOC will distribute the
 16 Release Cards to people leaving correctional facilities. *Brown II*, 953 F.3d at 573. This
 17 would be “the only way Defendants assure the use of and obtain payment for the
 18 cards.” *Id.* Alternatively, if NDOC offered released inmates the choice between a
 19 Release Card or a check, then NDOC directly marketed the Release Cards to them.
 20 *See* 12 C.F.R. § 1005.20(b)(4) (Supp. I) (“A card . . . is marketed to the general public if
 21 the potential use of the card . . . is directly or indirectly offered . . . to the general
 22 public.”).

23 Either way, the Release Cards are marketed to released inmates in Nevada and
 24 thus to the general public.

26 ¹¹The fact that Keefe alone markets the Release Cards to NDOC does not
 27 absolve Rapid of liability under Section 1693I-1. Violations of Section 1693I-1 occur
 28 when illegal fees are charged to a qualifying card, not when that card is marketed.
 Section 1693I-1 merely excludes from its requirements cards that are “*not* marketed to
 the general public.” 15 U.S.C. § 1693I-1(a)(2)(D)(iv) (emphasis added). Moreover,
 Keefe markets the Release Cards on Rapid's behalf. (ECF No. 95 at 9.)

b. Issued in Exchange for Payment

The Release Cards are also issued in “in exchange for payment.” 12 C.F.R. § 1005.20(a)(3)(i) (defining ‘general-use prepaid card’). General-use prepaid cards may be “purchased *or loaded* on a prepaid basis” under the EFTA. 15 U.S.C. § 1693l-1(a)(2)(A)(iii) (emphasis added). As a result, ‘issued in exchange for payment’ cannot reasonably be understood to refer exclusively to the initial point-of-sale purchase of a Release Card. See *Leigh v. Raby*, No. 3:22-CV-00034-MMD-CLB, 2024 WL 1345297, at *3 (D. Nev. Mar. 28, 2024) (explaining that the Court must interpret regulations to be cohesive with controlling statutory language and other regulations implementing that statute); cf. *Cody v. SoulCycle Inc.*, No. CV 15-6457-GHK (JEMx), 2016 WL 11129525, at *3 (C.D. Cal. Apr. 22, 2016) (finding that the phrase “‘purchased on a prepaid basis in exchange for payment’ . . . clearly refers to the initial point-of-sale purchase”). Regulations defining other cards covered under Section 1693l-1 support this interpretation. Store gift cards and gift certificates are similarly defined as being issued “on a prepaid basis . . . in exchange for payment,” whereas loyalty, award, and promotional gift cards are only defined as being issued “on a prepaid basis.” Compare 12 C.F.R. §§ 1005.20(a)(1), (2), with *id.* at (a)(4). The distinguishing factor between the cards that are issued ‘in exchange for payment’ and the cards that are not is who provided the funds loaded onto them. Prepaid cards are issued ‘in exchange for payment’ when their recipient, rather than their issuer, supplies the funds on the card.

With this legal issue resolved, the factual record is clear that Plaintiff’s Release Cards was issued in exchange for payment because all funds loaded onto the Card belonged to him. Defendants have not shown that the Release Cards are exempt from Section 1693l-1.

c. Fee Limitations Under EFTA Section 1693l-1

As the Release Cards are general-use prepaid cards subject to the fee limitations of Section 1693l-1, the Court will now assess whether Defendants violated those regulations. The EFTA prohibits imposing a service fee—that is, “a periodic fee, charge,

1 or penalty for holding or use of” a card—on a general-use prepaid card unless, among
 2 other requirements, the card has been inactive for twelve months and not more than
 3 one service fee is charged per month. 15 U.S.C. §§ 1693l-1(a)(3), (b)(1)-(2); *see also*
 4 12 C.F.R. § 1005.20(a)(6) (defining ‘service fee’).

5 Financial records show that Plaintiff was charged a weekly ‘account maintenance
 6 fee’ of \$1.50 between April 10 and July 24, 2020, until his account balance reached
 7 zero. (ECF No. 93-12 at 2.) According to a pamphlet on the Release Cards, these same
 8 weekly \$1.50 fees were charged to all Release Card holders within three days of a
 9 card’s activation, or 90 days of its issuance if not activated. (ECF No. 93-2 at 2, 5.)
 10 These ‘account maintenance fees’ are clearly “periodic fee[s] . . . for holding” any funds
 11 on Release Cards, which were levied more than once a month and less than 12 months
 12 after the Card was last used. 15 U.S.C. §§ 1693l-1(a)(3), (b)(2); *see also* 12 C.F.R. §
 13 1005.20(d). The account maintenance fees charged to Plaintiff’s Release Card were
 14 service fees charged in violation of Section 1693l-1. Plaintiff’s Motion is granted, and
 15 Defendants’ Motion is denied, as to Plaintiff’s claims under Section 1693l-1 of the EFTA.

16 **4. Statute of Limitations**

17 The EFTA imposes a one-year statute of limitations which accrues on “the date
 18 of the occurrence of the violation.” See 15 U.S.C. § 1693m(g). Each violation of Section
 19 1693l-1¹² started a new limitations period because the service fees caused Plaintiff
 20 separately accruing harms. See *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663,
 21 671 & n.6 (2014) (a harm is separately accruing, and thus starts a new limitations
 22 period, when a new infringing act causes “harm to the plaintiff over and above the harm”
 23 from earlier acts). Every service fee cost Plaintiff an additional \$1.50 “above and beyond
 24 the prior harm” of past service fees. *Diviacchi v. Affinion Grp., Inc.*, No. CIV.A. 14-
 25 10283-IT, 2015 WL 3631605, at *10 (D. Mass. Mar. 11, 2015), *report and*
 26 *recommendation adopted*, No. 14-CV-10283-IT, 2015 WL 3633522 (D. Mass. June 4,

27 ¹²The Court will defer resolution of when the statute of limitations began to run for
 28 violations of Section 1693i, as this issue was not fully briefed and the Court has not yet
 found Defendants liable under that provision.

2015). And each improper service fee is an individual, albeit repeated, violation of Section 1693I-1. See *id.*; *Smith v. Bank of Haw.*, No. CV 16-00513 JMS-RLP, 2018 WL 1662107, at *5 (D. Haw. Apr. 5, 2018); *Gunter v. United Fed. Credit Union*, No. 3:15-CV-00483-MMD-WGC, 2018 WL 4286181, at *4 (D. Nev. Sept. 7, 2028); *Bettencourt v. Jeanne D’Arc Credit Union*, 370 F. Supp. 3d 258, 266 (D. Mass. 2019). Though the ‘account maintenance fees’ were a recurring weekly charge, every fee required Defendants to make an “independent determination” that the Release Card in question was not yet depleted. *Gunter*, 2018 WL 4286181, at *4 (discussing overdraft fees). Determining whether a service fee violated Section 1693I-1 here likewise requires analyzing the timing of that individual fee.¹³ See *Smith*, 2018 WL 1662107, at *5.

To the extent that Remaining Class Members allege an improper service fee was charged to their Release Card on or after July 31, 2019, Defendants are not entitled to summary judgment on their Section 1693I-1 claim. (ECF No. 1 at 2.) Claims based on service fees imposed outside the one-year limit, however, are time-barred.

C. Nevada Deceptive Trade Practices Act

The Nevada Deceptive Trade Practices Act (“NDTPA”) provides a private right of action to victims of deceptive trade practices. See *Sears v. Russell Rd. Food & Beverage, LLC*, 460 F. Supp. 3d 1065, 1070 (D. Nev. 2020); *Leigh-Pink v. Rio Properties, LLC*, 512 P.3d 322, 327 (Nev. 2022); NRS § 41.600(1). To qualify as a ‘victim,’ Plaintiff must show that he was “directly harmed” by Defendants’ alleged consumer fraud. *R.J. Reynolds Tobacco Co. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 514 P.3d 425, 433 (Nev. 2022). That is, Plaintiff must “prove that (1) an act of consumer fraud by the defendant (2) caused (3) damage to [him].” *Sattari v. Wash. Mut.*, 475 F. App’x 648, 648 (9th Cir. 2011) (quoting *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 658 (D. Nev. 2009)). For each of Plaintiff’s claims under the NDTPA, the parties dispute both whether Defendants engaged in prohibited deceptive trade

¹³The Court declines to determine whether the statute of limitations should operate differently for service fees charged without proper initial disclosures.

1 practices and whether Plaintiff qualifies as a ‘victim’ who may bring suit under the
2 NDTPA.

3 **1. Misrepresentation of Rights, Obligations, or Remedies**

4 Plaintiff first alleges that Defendants knowingly misrepresented his legal rights
5 and obligations when NDOC suppressed important information about the fees charged
6 to Release Cards. See NRS § 598.092(8) (prohibited deceptive trade practices include
7 “[k]nowingly misrepresent[ing] the legal rights, obligations or remedies of a party to a
8 transaction”). “The suppression or omission of a material fact which a party is bound in
9 good faith to disclose is equivalent to a false representation.” *Noonan v. Bayview Loan*
10 *Servicing, LLC*, 438 P.3d 335 (Nev. 2019) (quoting *Nelson v. Heer*, 163 P.3d 420, 426
11 (Nev. 2007)) (brackets omitted). Defendants may have had a duty to inform Plaintiff of
12 the fees charged to his Release Card. See 12 C.F.R. § 1005.18(b)(1)(i). The
13 suppression or omission of the Release Card fee schedule could therefore constitute a
14 fraudulent misrepresentation prohibited by the NDTPA. See *Nelson*, 163 P.3d at 427
15 (looking to statutorily required disclosures in assessing whether an omission constituted
16 a fraudulent misrepresentation). However, the record is not clear on whether
17 Defendants were aware of NDOC’s practice of denying inmates material information
18 about Release Card fees or possible alternative means of receiving their account
19 balance. See *Poole v. Nev. Auto Dealership Invs., LLC*, 449 P.3d 479, 483 (Nev. App.
20 2019) (“[A] ‘knowing[]’ act or omission under the NDTPA does not require that the
21 defendant intend to deceive with the act or omission . . . but simply that the defendant is
22 aware that the facts exist that constitute the act or omission.”).

23 There are likewise factual questions as to whether Plaintiff’s alleged damages
24 were “proximately caused by reliance on the . . . omission.” *Nelson*, 163 P.3d at 426.
25 The proximate cause of an injury is “any cause which in natural[,] foreseeable[,] and
26 continuous sequence unbroken by any efficient intervening cause, produces the injury
27 complained of and without which the result would not have occurred.” *Clark Cnty. Sch.*
28 *Dist. v. Payo*, 403 P.3d 1270, 1279 (Nev. 2017) (cleaned up). If NDOC only distributed

1 inmate trust funds on Release Cards, then NDOC's failure to share the full fee schedule
 2 cannot be the proximate cause of Plaintiff's harm, as receiving additional information
 3 about the fees before being released could not have changed his circumstances.¹⁴ But
 4 in the event that alternative means of distributing Plaintiff's inmate trust fund were
 5 available, NDOC's omission was the proximate cause of Plaintiff's harm if Plaintiff would
 6 have chosen to receive his inmate trust fund balance via that other distribution method
 7 had he known about its existence and/or the entirety of the Release Card fees.

8 Given the multiple remaining factual questions, both Motions are denied as to
 9 Plaintiff's claim under NDTPA Section 598.092(8).

10 **2. Inability to Protect Own Rights**

11 Section 598.092(14) of the NDTPA prohibits knowingly taking advantage of a
 12 person's "inability reasonably to protect his or her own rights or interests in a consumer
 13 transaction" due to illiteracy, mental or physical infirmity, "or another similar condition
 14 which manifests itself as an incapability to understand the language or terms of any
 15 agreement." NRS § 598.092(14). This provision, like all provisions of the NDTPA,
 16 should be afforded "liberal construction to accomplish its beneficial intent." *Poole*, 449
 17 P.3d at 485.

18 While Section 598.092(14) most obviously protects persons suffering from some
 19 internal impediment to consenting to an agreement, its protections extend further. See
 20 NRS § 598.092(14) (listing examples); *Manley v. MGM Resorts Int'l*, No. 2:22-CV-
 21 01906-MMD-DJA, 2023 WL 3737509, at *4 (D. Nev. May 30, 2023) (suggesting that
 22 Section 598.092(14) protects intoxicated persons). Plaintiff alleges here that external
 23 circumstances—namely, NDOC's refusal to allow him to review the Release Card
 24 Agreement before signing it—barred him from understanding the Agreement's terms.
 25 The result of NDOC's actions was functionally equivalent to contracting with an illiterate
 26 or infirm consumer, as Defendants entered into an agreement with a consumer who

27
 28 ¹⁴Plaintiff had access to the Cardholder Agreement, and thus the full fee schedule, once released. (ECF No. 93 at 15.)

1 necessarily lacked the capacity to understand the terms of the contract. Denying this
2 cause of action to Plaintiff simply because the actions of NDOC, rather than his own
3 actions or innate state of being, rendered him incapable of assenting would be
4 manifestly unfair. Thus, as an incarcerated person in the custody of a correctional
5 department whose alleged practice or policy was to disallow inmates from reviewing
6 Cardholder Agreements before signing them, Plaintiff was subject to a “condition which
7 manifest[ed] itself as an incapability to understand the language or terms of any
8 agreement.” NRS § 598.092(14).

9 Factual questions remain, however, as to whether Defendants were aware that
10 NDOC engaged in this practice of prohibiting inmates from reviewing the Release Card
11 Agreement. Both Motions are therefore denied as to NDTPA Section 598.092(14).

12 **3. Knowing Violation of State or Federal Law**

13 Under Section 598.0923(1)(c) of the NDTPA, a person also engages in a
14 deceptive trade practice when, in the course of their business, they knowingly violate a
15 “federal statute or regulation relating to the sale or lease of goods or services.” NRS §
16 598.0923(1)(c). Plaintiff specifically alleges that Defendants knowingly violated Section
17 1693i and 1693I-1 of the EFTA and their implementing regulations.

18 For the same reasons that summary judgment was denied as to Defendants’
19 liability under EFTA Section 1693i, summary judgment is inappropriate as to whether
20 Defendants knowingly violated NDTPA Section 598.0923(1)(c) vis-à-vis Section 1693i.

21 But Plaintiff has established that Defendants knowingly violated Section 1693I-1
22 of the EFTA. Defendants do not dispute that they charged Plaintiff a weekly service fee
23 on his Release Card starting three days after funds were first loaded onto his Card.
24 (ECF No. 93-12.) These fees were levied too early and too frequently to comply with
25 Section 1693I-1. See 15 U.S.C. §§ 1693I-1(b)(2); 12 C.F.R. § 1005.20(d). And there is
26 also no dispute that Defendants knew when and how often they charged Plaintiff fees
27 for holding funds on his Release Card. (ECF No. 93-2 (Release Card pamphlet stating
28 that users would be charged a weekly fee beginning three days after the Card is

1 activated or 90 days after the Card is issued.) See *Poole*, 449 P.3d at 481 (stating that
 2 a ‘knowing’ act under the NDTPA requires only that “the defendant is aware that the
 3 facts exist that constitute the act or omission”). Defendants knowingly violated EFTA
 4 Section 1693I-1, and Plaintiff has a private right of action under NDTPA Section
 5 598.0923(1)(c) to challenge those EFTA violations because each illegal service fee
 6 “directly harmed” him by taking an additional \$1.50 from his account. *R.J. Reynolds*
 7 *Tobacco Co.*, 514 P.3d at 433. The Remaining Class Members are entitled to summary
 8 judgment on their Section 598.0923(1)(c) claims vis-à-vis EFTA Section 1693I-1.¹⁵

9 **D. Conversion**

10 Under Nevada law, conversion is “a distinct act of dominion wrongfully exerted
 11 over another’s personal property in denial of, or inconsistent with his title or rights
 12 therein or in derogation, exclusion, or defiance of such title or rights.” *M.C. Multi-Fam.*
 13 *Dev., L.L.C. v. Crestdale Assocs., Ltd.*, 193 P.3d 536, 542 (Nev. 2008) (emphasis
 14 omitted). Conversion is an act of general intent that cannot be excused by care, good
 15 faith, or lack of knowledge and thus does not require wrongful intent. See *Evans v.*
 16 *Dean Witter Reynolds, Inc.*, 5 P.3d 1043, 1048 (Nev. 2000). Nor does conversion
 17 require the physical taking of property, as “tangible and intangible property alike can be
 18 converted.” *Blige v. Terry*, 540 P.3d 421, 431 (Nev. 2023). “Although money cannot
 19 typically be the subject of a conversion claim, it can be where the money is identifiable,
 20 such as being set aside in a separate account or separately earmarked.” *Dunham Tr.*
 21 *Co. as Tr. of Darrell N. Garmann Testamentary Tr. 2012 v. Wells Fargo Bank, N.A.*, No.
 22 3:18-CV-00181-LRH-WGC, 2019 WL 489095, at *6 (D. Nev. Feb. 7, 2019) (citing
 23 *Hester v. Vision Airlines, Inc.*, No. 2:09-CV-0117-RLH-RJJ, 2011 WL 856871, at *3 (D.
 24 Nev. Mar. 9, 2011)); see also *Lopez v. Javier Corral, D.C.*, 367 P.3d 745 (Nev. 2010).
 25 When funds from separate individuals’ Release Card accounts were taken out to pay

26
 27 ¹⁵The NDTPA has a four-year limitations period which begins to accrue “when
 28 the aggrieved party discovers, or by the exercise of due diligence should have
 discovered, the facts constituting the deceptive trade practice.” NRS § 11.190(2)(d).
 Because the class is defined such that no members have claims arising before July 31,
 2016, no NDTPA claims are time barred. (ECF No. 65.)

1 illegal service fees, Defendants converted money to which they had no right. (ECF No.
2 93-12 at 2.) See 15 U.S.C. § 1693I-1.

3 Defendants argue that Plaintiff's conversion claims are barred by the voluntary
4 payment doctrine, "an affirmative defense that states that a payment made voluntarily
5 cannot be recovered on the ground that there was no legal obligation to make the
6 payment." *3105 Coleman, LLC v. SMS Fin. Strategic Invs., LLC*, 542 P.3d 447 (Nev.
7 App. 2024); accord *Nev. Ass'n Servs., Inc. v. Eighth Jud. Dist. Ct.*, 338 P.3d 1250, 1253
8 (Nev. 2014). An exception to this doctrine exists, however, when "(1) one side
9 involuntarily accepted the terms of another; (2) circumstances permitted no other
10 alternative; and (3) circumstances were the result of coercive acts of the opposite
11 party." *Nev. Ass'n Servs.*, 338 P.3d at 1255 (ellipses omitted). As previously discussed,
12 triable issues of fact remain as to whether Plaintiff could reasonably use his Release
13 Card in a manner that did not incur service fees and thus other alternatives were
14 available.¹⁶ Summary judgment on the conversion claim is denied as a result.

15 **E. Unjust Enrichment**

16 "Unjust enrichment is the unjust retention of money or property of another against
17 the fundamental principles of justice or equity and good conscience." *Cap. Advisors,*
18 *LLC v. Cai*, 548 P.3d 1202, 1212 (Nev. 2024) (quotation marks omitted). The elements
19 of an unjust enrichment claim are "the plaintiff confers a benefit on the defendant, the
20 defendant appreciates such benefit," and the defendant accepts and retains the benefit
21 "under circumstances such that it would be inequitable for him to retain the benefit
22 without payment of the value thereof." *Certified Fire Prot. Inc. v. Precision Constr.*, 283
23 P.3d 250, 257 (Nev. 2012). The first two prongs are satisfied here, as "Defendants
24 received a benefit in the form of fees, and they were aware that they received the
25 benefit." *Brown v. Stored Value Cards, Inc.*, No. 3:15-CV-01370-MO, 2021 WL 76951,
26 at *3 (D. Or. Jan. 8, 2021) ("*Brown III*") (discussing similar test under Oregon law).

27
28 ¹⁶For the same reasons, the Court declines to grant summary judgment as to whether the voluntary payment doctrine bars Plaintiff's unjust enrichment claims.

1 Prong three, however, turns in part on whether Plaintiff could reasonably avoid the
 2 Card's fees. The parties dispute these factual circumstances, and a rational jury could
 3 go either way in resolving their disputes. The unjust enrichment claims are not
 4 susceptible to summary judgment.

5 **F. Takings Claim**

6 Plaintiff finally brings constitutional takings claims against Defendants. See U.S.
 7 CONST. amend. V (“[N]or shall private property be taken for public use, without just
 8 compensation.”)¹⁷; NEV. CONST. art. 1, § 8(3) (“Private property shall not be taken for
 9 public use without just compensation having been first made, or secured.”).¹⁸ Because
 10 no Defendants are governmental entities themselves, the Court will first assess whether
 11 Defendants may fairly be said to be state actors and whether the deprivation of
 12 Plaintiffs’ property interests was “caused by the exercise of some right or privilege
 13 created by the State or by a rule of conduct imposed by the state or by a person for
 14 whom the State is responsible.” *Lugar*, 457 U.S. at 937. The Court will then turn to
 15 whether the Release Card fees constitute a taking *per se*.

16 **1. State Actors**

17 Plaintiffs contend that Defendants are state actors under both the public function
 18 test and the joint action test. “Satisfaction of any one test is sufficient to find state action,
 19 so long as no countervailing factor exists.” *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th
 20 Cir. 2003).

21 “Under the public function test, when private individuals or groups are endowed

23 ¹⁷The Fifth Amendment Takings Clause is applicable to states through the
 24 Fourteenth Amendment Due Process Clause. See *Ward v. Ryan*, 623 F.3d 807, 810
 (9th Cir. 2010).

25 ¹⁸ “[S]ubsection 3 of Article 1, § 8 of the Nevada Constitution is akin to the
 26 Takings Clause of the U.S. Constitution.” *O’Neil v. Las Vegas Metro. Police Dep’t*, No.
 27 2:22-CV-00474-ART-BNW, 2023 WL 3095561, at *6 (D. Nev. Apr. 26, 2023). The
 28 Nevada Supreme Court has applied the test set out by the U.S. Supreme Court in *Lugar*
v. Edmondson Oil Co., 457 U.S. 922, 936 (1982), in assessing the constitutionality of an
 alleged taking under the Nevada Constitution. See *Saticoy Bay LLC Series 350*
Durango 104 v. Wells Fargo Home Mortg., a Div. of Wells Fargo Bank, N.A., 388 P.3d
 970, 972 (Nev. 2017).

by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.” *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 924 (9th Cir. 2011) (quoting *Lee v. Katz*, 276 F.3d 550, 554-55 (9th Cir. 2002)). This test is “satisfied only on a showing that the function at issue is both traditionally and exclusively governmental.” *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 748 (9th Cir. 2020) (quoting *Kirtley*, 326 F.3d at 1093). Charging fees for debit cards is not usually a governmental activity; however, returning inmate trust funds held by NDOC upon an incarcerated person’s release from NDOC custody is a traditionally and exclusively governmental function. See *Brown v. Stored Value Cards, Inc.*, No. 3:15-CV-01370-MO, 2016 WL 4491836, at *2 (D. Or. Aug. 25, 2016) (“*Brown I*”), *rev’d and remanded on other grounds*, 953 F.3d 567 (9th Cir. 2020). Defendants’ ability to distribute, and subsequently levy fees upon, inmate trust funds only came about by “the exercise of the state’s exclusive power to incarcerate prisoners.” *Knows His Gun v. Montana*, 866 F. Supp. 2d 1235, 1244 (D. Mont. 2012); see also *Brown I*, 2016 WL 4491836, at *2 (reaching this conclusion for prepaid cards used to return funds to persons released from jail). Indeed, Plaintiff received a Release Card solely because NDOC held his funds in trust while he was incarcerated, authorized Defendants to distribute these funds on Release Cards, and then issued Plaintiff a Release Card containing those inmate trust funds. See *West v. Atkins*, 487 U.S. 42, 54-55 (1988) (prison physician was a state actor where he was “authorized and obliged to treat prison inmates” and inmates could only seek care from state-authorized physicians). Distributing inmate trust funds is a public function which subjects Defendants to constitutional limitations.

Because Defendants satisfy the public function test, the Court need not consider whether they are also state actors under the joint function test.

2. Deprivation

Plaintiff appears to allege that he suffered a deprivation “caused by the exercise of some right or privilege created by the State” when Defendants charged

1 disproportionately high fees for distributing his inmate trust fund. Defendants could only
 2 run the Release Card program and levy these fees because of the authority delegated
 3 to them through their contract with NDOC. NDOC even set the Release Card fee
 4 schedule. (ECF No. 98 at 11.) Therefore, at a high level, the fees were charged
 5 pursuant to a “right or privilege created by the State.” *Florer*, 639 F.3d at 922; *see also*
 6 *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999).

7 NDOC did not give Plaintiff the opportunity to receive his inmate trust fund
 8 balance by any means other than a Release Card. (*Id.* at 13; ECF Nos. 93 at 14; 94 at
 9 10.) Thus, even if Plaintiff agreed to receive a Release Card and consequently
 10 authorized the service fees, he did so only because the state deprived him of other
 11 options for obtaining his money. *Cf. Wright v. Serv. Emps. Int’l Union Loc. 503*, 48 F.4th
 12 1112, 1122 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 749 (2023) (state law did not create
 13 a right or privilege in a union to direct the state’s deductions of union dues where state
 14 law required employees to authorize union dues deduction). Defendants’ ability to levy
 15 fees on Plaintiff’s Release Card was a privilege created by NDOC.

16 **3. Taking *Per Se***

17 Of course, to state a takings claim, Plaintiff must also establish that the alleged
 18 state actors’ challenged conduct falls within the purview of the Takings Clause.
 19 Defendants do not challenge whether the fees they charged were put toward a public
 20 use. Instead, they argue that fees charged to Release Cards are not *per se* takings
 21 because they are a fair approximation of the costs of benefits received and are
 22 voluntarily incurred.

23 “The Fifth Amendment does not proscribe the taking of property; it proscribes
 24 taking without just compensation.” *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235
 25 (2003). Fees for government services, as a result, must be a “fair approximation of the
 26 cost of benefits supplied.” *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989); *accord*
 27 *Brown II*, 953 F.3d at 576. Release Cards are charged \$1.50 in account maintenance
 28 fees per week, which adds up to a minimum of \$6.00 (and sometimes \$7.50) per month.

1 Though fees need not be “precisely calibrated” to the costs of administering Release
2 Cards, *Sperry*, 493 U.S. at 60, a “rational jury could determine that these fees exceeded
3 a fair approximation of any benefits supplied,” *Brown III*, 2021 WL 76951, at *1
4 (discussing \$5.95 monthly fee for release cards). Summary judgment on this issue is
5 denied so that a factfinder can decide whether the Release Card fees were “so clearly
6 excessive as to belie their purported character as user fees.” *Sperry*, 493 U.S. at 62.

7 Summary judgment is likewise inappropriate as to whether the fees charged to
8 Plaintiff’s Release Card were reasonably avoidable, and thus voluntarily incurred, in
9 light of the factual disputes regarding Plaintiff’s ability to use his Card without incurring
10 fees. *See Brown III*, 2021 WL 76951, at *1-2.

11 In sum, both Motions are denied as to the takings claims.

12 **IV. CONCLUSION**

13 The Court notes that the parties made several arguments and cited several
14 cases not discussed above. The Court has reviewed these arguments and cases and
15 determines that they do not warrant discussion as they do not affect the outcome of the
16 Motion.

17 It is therefore ordered that Plaintiff’s motion to strike (ECF No. 99) is denied.

18 It is further ordered that Plaintiff’s motion for summary judgment (ECF No. 93) is
19 granted as to his claims for certain violations of EFTA Section 1693I-1 and NDTPA
20 Section 598.0923(1)(c) vis-à-vis EFTA Section 1693I-1, as laid out in the order. The
21 motion is otherwise denied.

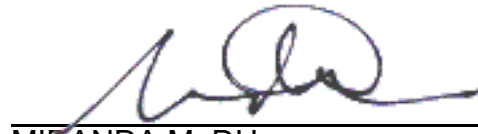
22 It is further ordered that Defendants’ motion for summary judgment (ECF No. 95)
23 is denied.

24 It is further ordered that Keefe’s motion for summary judgment (ECF No. 96) is
25 denied.

26 It is further ordered that the Court finds it appropriate to refer this case to United
27 States Magistrate Judge Craig Denney to conduct a settlement conference under LR
28 16-5 and the case is so referred. If the parties do not settle at the settlement

1 conference, the Joint Pretrial Order is due within 30 days of the date the settlement
2 conference is held.

3 DATED THIS 26th Day of August 2024.

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8 MIRANDA M. DU
9 CHIEF UNITED STATES DISTRICT JUDGE
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